IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The ruling of the trial court denying petitioner's counsel's request to recall an important Government witness, for the purpose of cross-examination on newly discovered material facts, tending to establish said witness' bias and an unscrupulous willingness to testify falsely, was a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution.

The evidence submitted on the part of the Government relied entirely upon the testimony of a co-conspirator, Frank Chessario, and the two alleged victims of the alleged

transportation from the State of Ohio to the State of Pennsylvania in violation of the provisions of the United States Code. The testimony of the co-conspirator was full of contradictions, and, coming from such a suspicious source, could not alone have caused the conviction of the petitioner. The Government had to rely mainly upon the testimony of a Miss Madeline Smith and her sister in order to secure a conviction.

Madeline Smith, according to her own testimony, was then about twenty-eight years of age, and had followed the trade of a prostitute for about fourteen years, and, therefore, started at the age of fourteen. (See notes of testimony, page 138.)

On November 19, 1938, Madeline Smith was convicted of conspiracy to violate the White Slave Act and served time. (Notes of testimony, page 139.) In 1943 she was detained as a material witness in Cuyahoga County for some forty days in connection with proceedings of the same nature. Her reputation and character therefore were very questionable. She had been convicted of felony and apparently was out again under a cloud of felony, in Youngstown, Ohio, where she had appeared as a material witness.

Prior to trial of petitioner's case, she had approached him at the Court House and at his hotel, and promised to "ease his worries." Upon his refusal to speak with her, both in the Court House and later at his hotel, she threatened that she and her sister (another important Government witness) would "make it hot" for him.

It thus became absolutely necessary, in order to determine the truth of her testimony given on direct examination, to inquire from her, first, whether or not she had talked to the petitioner at the Court House before the beginning of the trial, and subsequently at his hotel, and, secondly, her purpose for such action, in order to establish her bias and un-

scrupulous willingness to testify falsely, and thus disclose to the Court the worthlessness of her previous testimony.

It must be borne in mind she had first told the petitioner that she was going "to ease his worries," and then later "that she and her sister were going to make it hot for him."

> "To lay a foundation for the introduction of contradictory statements as impeaching evidence, the attention of the witness must first be drawn, on cross examination, to the time and occasion when, and place where, and person to whom, the varying statements were made." Cyclopedia of Federal Procedure, Vol. 7, sec. 3136, page 101, under the caption "Laying Foundation for Impeachment."

What were the feelings or disposition of the witness Madeline Smith towards the petitioner, when she attempted to approach him?

> "Inquiries into the feelings or disposition of the witness to conceal or pervert the truth are not to be excluded as being collateral. Personal ill will on the part of a witness towards a party to the action is evidence of bias which may affect credibility, and the right to elicit the fact on cross examination may not often be denied without an abuse of discretion which would be deemed prejudicial to the litigant." Ruling Case Law, Vol. 28, page 612, Paragraph 201, under the title, "Bias of Witness."
>
> "A witness may be impeached by showing his bias, as by proving near relationship, sympathy, hostility or prejudice and this may be done by his own testimony or by other evidence * * * Thus, improper conduct at the trial of a case such as an attempt corruptly to influence the result of a trial, is clear evidence of bias and may be shown." Ruling Case Law, Vol. 28, page 615, Paragraph 201, under the title, "Bias of Witness."

In the instant case, counsel for petitioner specifically stated to the Judge of the District Court that he desired to

lay the foundation to impeach the witness (page 262). The Court ruled that matter should be brought out by questioning the petitioner instead ,page 262). This is claimed to be a prejudicial and fundamental error.

Point II

Petitioner was denied the full protection of the due process of law clause of the Fifth Amendment when his counsel was not permitted to cross-examine the Government's witness, Madeline Smith, on material facts strongly affecting her honesty and credibility, after said counsel had notified the trial judge of her conduct and statements immediately before trial, which conduct and statements showed an apparent unscrupulous willingness on her part to falsify her testimony in one form or another.

The Court should have permitted petitioner's counsel to fully cross-examine this witness as to whether or not she had made contradictory statements to the petitioner concerning the nature and character of her testimony prior to the time when she actually testified, since the jury was entitled to know all the facts from which they could draw a proper conclusion. This right to fully present to the jury all of the pertinent evidence was denied the petitioner by the ruling of the Trial Judge of the District Court.

It must be borne in mind that the said witness threatened the petitioner that both she and her sister would "make it hot for him," and that this sister of Madeline Smith was also a very important witness to establish the Government's case. Without her testimony, and that of the witness Madeline Smith, the prosecution was bound to fail for the reason that the only other witness was a co-conspirator, whose testimony was also biased and scarcely worthy of much weight or credibility.

By denying petitioner's request for leave to cross-examine Madeline Smith, the Judge of the District Court also deprived petitioner's counsel from showing to the jury the bias of Madeline Smith's sister, as her examination in chief did not reveal the statements made by Madeline Smith to the petitioner, or the understanding "to make things hot" for said petitioner, which understanding apparently existed between the two sisters.

Your Honorable Court has repeatedly emphasized that:

> "Cross-examination of a witness is a matter of right. * * * Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * *"
>
> *Alford* v. *United States*, 282 U. S. 687, 691-693, 63 Federal Reporter (2d Series), Page 516.

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. * * * In this respect a summary denial of the right of cross-examination is

distinguishable from the erroneous admission of harmless testimony."

Alford v. *United States*, 282 U. S. 687, 691-693, 63 Federal Reporter (2d Series), Page 516.

Your Court has also held in the case of *Heard* v. *United States*, 255 F. 829, 832, and the case of *United States* v. *Phelan* (D. C.), 252 F. 891, 892, that:

"It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony."

The language in the above case continues as:

"A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

As was said in *United States* v. *Keown*, 19 Federal Supplement, 639, under Point (6) on Page 646:

"Every accused person has the right to cross-examine on material facts every witness who testified against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Starkie on Evidence (2d Ed) Vol. 1, page 160."

Point III

The Circuit Court of Appeals of the Third District, is sustaining the judgment of the court below, not only violated the fundamental rights of the petitioner, but its decision appears to be in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Cossack v. United States, No. 6947, reported in Federal Reporter, 2d Series, Volume 63, at page 511, wherein it was held that the judge of the District Court had erred in denying the defendant-appellant the right to cross-examine one of the Government witnesses, after the defense had made some unsuccessful attempts or offers to lay the foundation for her impeachment.

This apparent conflict of decisions tends to create uncertainty in a matter involving fundamental rights and requires the decision of higher authority for a final determination.

The Honorable Judge Wilbur Sawtelle, in writing the opinion for the Circuit Court of Appeals for the Ninth Circuit, as above set forth, stated as follows:

> "It must be remembered that Mrs. Totten herself had been called by the government after it had rested its case-in-chief; that the defense had made repeated and unsuccessful offers to lay the foundation for this impeachment during and after her cross-examination; that she was already under a felony cloud; that her testimony, if believed, would convince the jury that not only was the defendant Cossack guilty but was willing to resort to the most heinous crime known to the law in order to conceal his guilt; and that the impeaching evidence, on its face, disclosed that it was 'newly-discovered.' In view of these circumstances, we believe that the court committed an abuse of discretion in refusing the appellant's offer to present this evidence to the jury, tardy though the offer was.

Such refusal, we believe, deprived the appellant of a complete opportunity of presenting his case, and therefore fell short of the Anglo-Saxon conception of a fair trial."

"We cannot say that the jury would have convicted the appellant had it disbelieved Mrs. Totten's testimony."

In the case at bar the situation appears to be exactly the same. The government witness Madeline Smith, who had been convicted of a felony, and was under a cloud of felony immediately before the trial of the case, made contradictory statements to the petitioner concerning the testimony to be given by her in court at the trial of his case. These facts were brought to the attention of the Judge of the District Court by motions placed on the record and by verbal statements off the record, but, yet, the court refused to recall the witness so that defense counsel might cross-examine her for the purpose of discrediting her testimony and impeaching her credibility. Such refusal, we believe, deprived the petitioner of a complete opportunity of presenting his case, and, quoting from the learned opinion of the Circuit Court of Appeals, above cited, "fell short of the Anglo-Saxon conception of a fair trial."

Finally, as Judge Sawtelle stated in the case above cited, *Coassacks* v. *United States,* we, too, contend that we can not say that the jury would have convicted the petitioner had it disbelieved Miss Smith's testimony.

Conclusion

We respectfully submit that this is a case eminently proper for this Honorable Court to Review.

Respectfully submitted,

Edward E. Petrillo,
Counsel for Petitioner.